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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~[illegible]~~ 215

OVERNITE TRANSPORTATION COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 171, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

BRIEF FOR THE UNION IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1447

OVERNITE TRANSPORTATION COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 171, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor

BRIEF FOR THE UNION IN OPPOSITION

This case involves a decision of the National Labor Relations Board, herein referred to as the Board, under Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, U.S.C. § 151, et seq. The main issue presented by Petitioner to this Court concerns an Order of the Interstate Commerce Commission, herein referred to as the I.C.C.

QUESTIONS PRESENTED

1. Whether there is a conflict in the Decisions and Orders of the Board and the I.C.C. and, if so, whether the jurisdiction of the Board is preempted by the I.C.C.?

2. Whether the Board has the authority to order a successor employer to bargain with the exclusive bargaining representative of its employees in an appropriate unit and refrain from unilaterally changing the employees' wages, hours and working conditions?

3. Whether it is within the Board's discretion to remedy unfair labor practices by ordering a restoration of the status quo ante?

STATEMENT

A. BOARD'S FINDINGS OF FACT

In 1963, the Petitioner entered into a contract to purchase Rutherford Freight Lines, herein referred to as Rutherford. Since both companies were common carriers engaged in the freight industry, application was made to the I.C.C. to obtain authority for the purchase in accordance with Section 5(2) of the Interstate Commerce Act, 49 U.S.C., § 5. After a hearing in which Teamsters Local Union No. 171, herein referred to as the Union, intervened and participated, the I.C.C. issued an Order on July 31, 1964, authorizing the purchase. *Overnite Transportation Company—Purchase—Rutherford Freight Lines, Inc.*, 97 MCC 568.

Petitioner contended before the I.C.C. that its obligation to recognize and bargain with the Union as a successor to Rutherford was not before the I.C.C. but was reserved exclusively to the Board [U No. 2, 246-247].[1] The I.C.C. adopted the contention of the Petitioner and made no finding or recommendations with respect to the labor relations issues, citing *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962) [198-199].

The I.C.C. provided in its Order for severance pay of not more than three months for employees separated from employment because of the purchase, to be computed "at the rate of his average monthly pay for 12 months immediately preceeding the month in which he was dis-

[1] References are to the Joint Appendix filed with the Court below. Reference to Petitioner's brief is "Pet." and to the Opinion of the Court below by "Pet. App." Exhibits are designated "Co." for Petitioner, "GC" for General Counsel, and "U" for Union.

charged, said payments to be reduced by the amount of the total wages earned during the period." [Co. No. 33E, 202].

The employees of Rutherford at its Roanoke and Pulaski, Virginia terminals were represented by the Union for many years. On August 27, 1964, Rutherford notified the Union that it was terminating the labor contract and requested immediate negotiations. Rutherford and the Union met in negotiations between August 27, and November 19, 1964, and as a result Rutherford continued to apply the terms and conditions of the labor contract [63-64, 68, 77-78].

Meanwhile, on October 29, 1964, the Union's attorney wrote the Petitioner to inquire when it would consummate its contract to purchase Rutherford. The reply was that no date had been set. Petitioner specifically refused to recognize the Union, stating that ". . . any question of union representation must necessarily be deferred to a later date" [146]. This was the first time that the Petitioner refused to recognize the Union; at the I.C.C. hearing the Petitioner refused to answer the Union's request for recognition as the employees' bargaining representative [170-177].

On October 29, 1964, the Union's attorney wrote to Petitioner and again requested information concerning the purchase of Rutherford [GC No. 5, 206]. Petitioner took over Rutherford on November 19, 1964, but prior thereto never gave the Union any information.

After taking over Rutherford's operation, Petitioner notified the Union [Co. No. 23, 147]. When the Union requested recognition and adherence to the labor contract on November 20, 1964 [Co. No. 20, 147], Petitioner agreed to

recognize the Union but refused to abide by the labor contract [Co. No. 26, 149-151]. Negotiations were delayed until January 1965, but since the first negotiating meeting the Union has protested Petitioner's reduction of the employees' wages, hours, and working conditions without notifying the Union [69, 95]. Petitioner has never restored the conditions of employment which it unilaterally changed on November 19, 1964.

That Petitioner is the successor to Rutherford at the Roanoke and Pulaski, Virginia terminals is demonstrated by the fact that it employed the same employees and supervisors [86-90], who performed substantially the same work [92-94], at the same terminals, with the same equipment, for the same customers [40, 85-86].

B. BOARD'S CONCLUSIONS AND ORDER

Upon the facts set forth above, the Board found that Petitioner was a successor to Rutherford; that the employees at the Roanoke and Pulaski terminals continued in the same "employing industry" [21]; and that Petitioner unilaterally changed the employees' wages, hours, and working conditions without notice to or negotiations with the Union in violation of Sections 8(a)(1) and (5) of the Act [23]. Accordingly, the Board ordered a restoration of the status quo ante [24, 28, 33-34]. The Board rejected Petitioner's contention that the Board was bound by the Order of the I.C.C.; noted that the I.C.C. made no findings concerning the labor relations issues involved; held that it had sole jurisdiction over the administration of the Act; and observed that Petitioner's contentions that the Board had no jurisdiction was directly contrary to its argument advanced to the I.C.C. [33].

C. DECISION OF THE COURT OF APPEALS

The Court of Appeals enforced the Board's Order, citing this Court's decision in *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964), and numerous Board and court "successor" cases [Pet.App. 4a-6a]. It concluded that the Board correctly held that Petitioner was a successor to Rutherford and, as such, it could not take unilateral action without bargaining with the Union, citing *NLRB* v. *Katz,* 369 U.S. 736 (1962) [Pet.App. 6a-8a]. The court summarily rejected Petitioner's argument that the Board's jurisdiction was preempted by the I.C.C., citing *NLRB* v. *Parran,* 237 F.2d 373 (C.A. 4, 1956); *Burlington, supra;* and *Local 1976 United Brotherhood of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958) [Pet.App. 9a].

The court held that the order requiring restoration of the status quo ante was not "extraordinary" and was "plainly within the discretionary power of the Board," citing *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) [Pet.App. 10a]. Judge Bryan dissented solely on the issue of remedy; he contended that the Board should redetermine the period of restoration [Pet.App. 10a-12a].

ARGUMENT

1. Petitioner's argument is unsupported by the facts. The I.C.C. in approving the purchase of Rutherford by Petitioner provided for employee protection by ordering three months severance pay, minus interim earnings, for employees separated from employment because of the purchase. It did not establish any wages or conditions of employment and took great pains to avoid the labor issue, the duty to bargain. Similarly, the Board did not establish

wages or conditions of employment or in any way nullify or modify the order of the I.C.C. The Board exercised its jurisdiction by determining Petitioner's bargaining obligations under Sections 8(a)(1) and (5) of the Act. Each administrative agency adhered to its jurisdiction in full cognizance of the admonitions of this Court in *Burlington, supra,* and *Sand Door, supra.*

The suggestion of Petitioner [Pet. 23] that the Congress intended different labor relations obligations to apply to regulated common carriers involved in I.C.C. proceedings as distinguished from all other employers covered by the Act is plainly mistaken. Such a fragmentation or compartmentalized approach to the obligation to bargain under the Act is not reflected in a reading of Section 2(2) of the Act and is contrary to this Court's teaching in *Burlington, supra,* and *Sand Door, supra.* In no sense did or could the I.C.C. license Petitioner to violate its duty to bargain under the Act.

Neither the case of *Brotherhood of Locomotive Engineers* v. *Chicago and Northwestern Railway Co.,* 314 F.2d 424 (C.A. 8, 1963), cert. den. 375 U.S. 819, nor the reference to Section 5(11) of the Interstate Commerce Act, was ever raised until the Petition for Rehearing in the Court of Appeals. *Chicago and Northwestern, supra,* was specifically limited to its "peculiar factual situation," 314 F.2d at 434, and concerned the relation of the Railway Labor Act to the Interstate Commerce Act. There, unlike this case, the I.C.C. did not leave the resolution of the labor issue to another administrative agency. There, the Court was strongly influenced by the fact that the employers and the unions involved entered into a written stipulation govern-

ing employee protection which was submitted to and approved by the I.C.C. *cf. Texas and New Orleans Railroad Co., et al.* v. *Brotherhood of Railroad Trainmen, et al.*, 307 F. 2d 151 (C.A. 5, 1962), cert. den. 371 U.S. 592 (1963), where there was no stipulation of agreement between the parties.

2. Petitioner totally misconstrues the Order of the Board and the Court of Appeals. Neither tribunal addressed itself to, or required, "anticipatory pre-purchase bargaining" [Pet. 26] but both the Board and the Court of Appeals relied on decisions of this Court in holding that an employer cannot ignore the employees' collective bargaining representative and unilaterally change its employees' wages, hours, and conditions of employment.

Petitioner's misconception of its bargaining obligation has led it to quote the Board out of context. On page 41 of its petition a quotation is extracted from the Board's decision in *Chemrock Corporation*, 151 NLRB 1074, 1080, fn. 8 (1965). To understand the Board's position it is necessary to consider the entire paragraph in said footnote:

> We do not hold, as Member Jenkins suggests, that the purchaser of an enterprise is legally obligated to refrain from making any changes in the employment status of his predecessor's employees or to continue their employment under existing terms and conditions of employment. Rather we hold that, in circumstances such as those described above, the purchaser may not ignore the employees' collective-bargaining representative in dealing with them as to matters related to the continuation

of their employment and the terms and conditions of such employment.

It is clear that Petitioner is a successor to Rutherford. Under Section 8(a)(5) of the Act, the obligation of a successor is to recognize the employees' bargaining representative. The duty to recognize includes the obligation to bargain and to refrain from unilateral changes in employment conditions. Accordingly, the Board and the Court of Appeals in their well reasoned opinions were fully justified in relying on this Court's decisions in *Wiley, supra, Katz, supra,* and *Fibreboard, supra,* as well as the numerous "successor" decisions from the various Courts of Appeals. There is no conflict in any other Court of Appeals with the decision in this case.

3. The Court of Appeals noted that the remedy adopted by the Board is the same remedy approved by this Court in *Fibreboard, supra.* The remedy is in no sense unprecedented, arbitrary, or extraordinary [cf. Pet. 37], and Petitioner at no time attempted to meet its burden in this respect.

Petitioner's violation of the Act by its unilateral activity is consistent with its statement to its employees on November 19, 1964, that it was not union and did not plan on being union. Likewise, this statement fits the pattern of Petitioner's sordid history of violations of the Act. These violations are set forth herein as Appendix A.

Petitioner's attempt to rely on Rutherford's bargaining is unavailing at this late date and its assertion that Rutherford and the Union reached a bargaining impasse [Pet. 37] is contrary to the facts. Rutherford and the Union

reached agreement that the employees' wages and conditions of employment would continue without charge. Similarly unavailing is Petitioner's reliance on *Cooper Thermometer,* — F.2d — 65 LRRM 2113 (C.A. 2, April 1967). That case involved the relocation of a plant, not a successor employer. On the facts of that case, the Court held that the employer had no obligation to recognize the union at its new location because the union did not represent a majority of its employees. *Cooper, supra,* made no reference to this case and the Court's difficulty with the Board's back pay remedy stemmed from an inability to determine who among the employees would have transferred to the new location.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

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APPENDIX A

The Record of
Overnite Transportation Company

1. 129 NLRB 261 (1960), enf. in part 308 F. 2d 234 (C.A. 4, 1962)
2. 129 NLRB 1026 (1960), suppl. at 133 NLRB 1488
3. 134 NLRB 1513 (1961)
4. 141 NLRB 384 (1963), enf. 327 F. 2d 36 (C. A. 4, 1963)
5. 154 NLRB No. 98 (1965), enf. 364 F. 2d 682 (C.A. D.C., 1966)
6. 157 NLRB No. 103, enf. — F. 2d — 64 LRRM 2359 (C.A. 4, 1966)
7. 158 NLRB No. 91 (1966)
8. 161 NLRB No. 38 (1966)
9. 164 NLRB No. 13 (1967)